

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

VS.

AND

AND

Docket No. 154,769

ORDER

ON the 24th day of February, 1994, the application of the respondent for review by the Workers Compensation Appeals Board of an Award entered by Administrative Law Judge George R. Robertson, dated December 30, 1993, came on for oral argument.

APPEARANCES

The claimant appeared by and through his attorney, Gene F. Anderson of Hays, Kansas. The respondent and its insurance carrier appeared by and through their attorney, Scott J. Mann of Hutchinson, Kansas. The Kansas Workers Compensation Fund appeared not, having been dismissed from the case by an Order dated May 28, 1993. There were no other appearances.

RECORD

The record considered on appeal is the same as that listed in the Award by the Administrative Law Judge.

STIPULATIONS

The Appeals Board adopts the stipulations listed in the Award of the Administrative Law Judge.

ISSUES

The issues presented on appeal are the same as those considered by the Administrative Law Judge, to wit:

- (1) What is the nature and extent of claimant's disability?
- (2) Is claimant entitled to future medical benefits?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

(1) After consideration of the arguments by the parties and review of the entire record, the Appeals Board finds, for the reasons stated below, that claimant sustained a twenty percent (20%) permanent partial general functional disability from the date of his accident of April 15, 1988, to the date he last worked for respondent of December 12, 1989. Thereafter he suffered a fifty-four and one-half percent (54.5%) permanent partial general work disability as a result of his accidental injury on April 15, 1988.

Claimant, at the time of his Regular Hearing testimony, was a forty-eight (48) year old married man, living in Hays, Kansas. He had worked for respondent all of his adult life, continually since 1964 and part-time prior to that. He worked as a roustabout doing oil field repair work including all types of manual labor and heavy equipment operation. Claimant has a ninth grade education.

On April 15, 1988, he and some co-workers were at an oil well location in Ellis County repairing a pumping unit. Claimant was standing on a ladder, known as a samson post, when an equalizer bar weighing between 1,000 and 1,500 pounds came loose from the winching line, striking claimant in his low back and buttocks area and pinning him against the samson post.

He was taken to St. Anthony Hospital in Hays where he was treated for approximately ten days under the care of Dr. Roy Neil, his family practice physician, and Dr. Victor Eddy, a general surgeon. During this period of hospitalization he was given blood transfusions for internal bleeding. After his dismissal from the hospital, he was referred to Dr. Howard Wilcox, an orthopedic surgeon in Hays. Dr. Wilcox is still his treating physician. He has also treated with several other physicians including Dr. Asher, Dr. Thomas, Dr. Woods, Dr. Carlson, and Dr. Crocker. In addition to internal injuries, claimant also sustained injury to his low back, neck, left ankle, right shoulder, and subsequently aggravated a pre-existing problem in his right knee.

Claimant returned to work for the period of approximately June 6, 1988 until December 12, 1989, when he was forced to quit working for the respondent because of his injuries and resulting disabilities. Claimant currently describes complaints of sharp pain in the lower part of his back, rectal pain, neck stiffness which causes headaches, left ankle pain and right knee pain. Activity worsens his symptoms as do weather changes. He describes having pain every day.

In February 1991, claimant attempted to go to work for Hays Asphalt Company as a truck driver. He was put to work running a backhoe. He worked approximately four hours and was unable to continue working due to back, hip and leg pain. He has not worked since.

Expert medical evidence was introduced through the depositions of Doctors Eddy, Neil, Wilcox, and Brown. Much of the medical testimony involves questions concerning the causal relationship between certain of claimant's complaints and the subject accident. The Appeals Board finds the weight of the credible evidence supports a conclusion that all of claimant's symptoms and complaints for which he has received medical treatment since April 15, 1988, stem from the subject work-related injury as either having been caused by that injury or by aggravating a pre-existing condition. The only conditions for which claimant has not established a sufficient nexus to the accidental injury are the pilonidal cyst removed in 1990 by Dr. Eddy and the suspected internal hemorrhoids or fissures. Dr. Eddy was asked about the relationship of the pilonidal cyst on which he performed surgery and the work-related injury. He indicated that a blow could aggravate and cause claimant to have trouble with the cyst but that the cyst itself had no relation to the work injury. Because the cyst became infected and started bothering claimant subsequent to the injury, this aggravation could have been a result of the trauma. However, Dr. Eddy did not state this in terms of medical probability and consequently claimant has not met his burden in this regard. Claimant was referred to Dr. Thomas by the Administrative Law Judge for evaluation and to help establish whether or not there is a causal connection between the work-related injury and the rectal complaints. However, it is not clear from the record whether such a determination was ever made. The deposition of Dr. Thomas was not taken.

Howard L. Wilcox, Jr, M.D., is a board-certified orthopedic surgeon practicing in Hays, Kansas. He has been treating claimant since April 10, 1989, primarily for the injuries to his back and neck. His diagnosis is degenerative cervical and lumbar disc disease aggravated by the trauma from the work-related injury. He likewise relates the left ankle complaints to the same injury. Dr. Wilcox recommended a work hardening program. Claimant participated in such a program but it was discontinued short of completion. He thinks claimant made an effort at work hardening but had legitimate difficulty with the more strenuous exercises. There was also some interruption because of hemorrhoids. Dr. Wilcox believes claimant is able to tolerate walking, some sitting, and light activities. He anticipates claimant will experience continued pain with variance based upon his level of activity. He may be able to tolerate more as time goes on. In his opinion, claimant has a twenty-five percent (25%) functional impairment to the body as a whole as a result of his neck and back injuries. He should be restricted to limiting standing at one place without moving to no more than one (1) hour at a time. Sitting without moving should be limited to no more than one (1) hour at a time. He should not lift over twenty-five (25) pounds occasionally and ten (10) pounds frequently. He should be limited to occasional bending, stooping, squatting, crouching, and kneeling. He defines occasional as no more than once or twice per hour. Claimant could probably tolerate walking without much limitation. Also, climbing and walking up and down stairs are not restricted. There are no restrictions on the use of his hands to grasp, push and pull. Likewise, there are no specific environmental restrictions, but cold and damp often cause increased back trouble. Dr. Wilcox did not limit claimant's operation of motor vehicles or heavy equipment unless such activity would place a strain on his back.

Claimant was examined on two occasions by C. Reiff Brown, M.D., a board-certified orthopedic surgeon in Great Bend, Kansas. Claimant reported continued pain in the low back, left hip, neck and upper thoracic and cervical areas. He also complained of pain in the rectal area. Dr. Brown diagnosed degenerative disc disease in the lower three levels of the lumbar spine with aggravation of that degenerative process as a result of the injury. He rated claimant as having a fifteen percent (15%) permanent partial impairment of

function to the body as a whole, taking into consideration the low back complaints as well as the upper back and neck areas. He recommended claimant be restricted to occasional lifting of fifty (50) pounds, frequent lifting of twenty-five (25) pounds, all being done utilizing proper body mechanics, and also that he avoid frequent bending. He defined occasional lifting as not more than two-thirds of the day. Dr. Brown testified that if claimant had been able to complete the work hardening program then he would have hoped that the restrictions could have been increased to seventy-five (75) pounds occasional lifting and forty (40) pounds frequent. However, claimant was not able to complete work hardening. He cannot say whether the job claimant attempted in February 1991 with Hays Asphalt would be within his restrictions.

Although there was some indication in the record that claimant was concerned about the effects of the physical activity involved in work hardening on his pre-existing physical problems including a brain tumor and heart trouble, it is clear that claimant was also experiencing an increase of his symptoms from his work-related injury as a result of the work hardening. Those symptoms prevented claimant from making adequate progress in the program such that, in the opinion of Dr. Brown, it was not worthwhile to continue.

Claimant was evaluated by Bud Langston, Director of Kansas Rehabilitation and Clinical Consultants and Work Recovery Centers in Topeka, Kansas. He is certified as a qualified rehabilitation professional with the Division of Workers Compensation as a qualified vendor and is licensed with the American Board of Vocational Experts. Mr. Langston testified concerning his opinions as to the ability of claimant to perform work in the open labor market and the extent to which his ability to earn comparable wage has been reduced by the injuries suffered in the work-related accident and claimant's resulting disability and impairment. In reaching his conclusions, he took into consideration claimant's educational background, training, work and other life experiences, and his capacity for rehabilitation. Capacity for rehabilitation would take into consideration his age, previous work experience, education, ability to be retrained or reeducated and also the restrictions placed upon him by the physicians. The restrictions considered significant by Mr. Langston were those provided by Dr. Wilcox and Dr. Brown. Taking both those restrictions into consideration, it was his opinion that claimant's ability to perform work in the open labor market has been reduced by approximately eighty-one percent (81%) and his ability to earn comparable wage has been reduced by twenty-eight percent (28%).

Respondent attempted to impeach the credibility of the opinions expressed by Mr. Langston first by cross-examining him as to the restrictions Dr. Brown stated he would hope claimant would have had he completed work hardening. As we have said, claimant did not complete work hardening and we find this was not due to a lack of effort on his part. Therefore, those hypothetical restrictions are not only speculative but irrelevant. Second, respondent attempted to impeach the credibility of Mr. Langston's opinions through the testimony of another vocational expert, Mr. Bruce Smith. Mr. Smith was involved in the vocational rehabilitation assessment and plan implemented and approved for claimant. In his opinion, claimant could return to employment in the open labor market at a comparable wage. Among the jobs Mr. Smith pointed to in support of this position were those of heavy equipment operator, truck driver, utility worker, custodian and bus driver. He also described the job at Hays Asphalt which claimant was unable to perform as being within claimant's restrictions. Mr. Smith questioned claimant's motivation and described what he considered to be a lack of cooperation with vocational rehabilitation, specifically job placement. On the other hand, claimant testified that in his opinion he cooperated fully

with the vocational rehabilitation plan, participated in job search activities and followed-up on the leads given him.

Claimant does not consider himself capable of performing within the restrictions recommended by Dr. Brown. In his opinion, the most he thinks he can lift is about thirty (30) pounds. Even this amount causes him back problems. Also, doing chores around the house cause him problems, particularly those that require him to work bending over. The backhoe that he operated for Hays Asphalt required leaning forward, pulling and pushing levers with his hands and feet. This piece of equipment did not offer him any back support and bothered his back to the point that he could not continue working after four (4) hours. He testified that he does not have the education, skills, or training for anything but manual labor. He does not consider himself capable of returning to work as a roustabout. He tried it for a period of time and it did not work out. By the time he left that job in December 1989, his back and right leg were giving him problems to the extent that he had to use crutches.

In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record. K.S.A. 44-501(a).

"Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record. K.S.A. 44-508(g).

In the case before us, the weight of the credible evidence supports the claimant's contention that as a result of his work-related injury he is no longer able to continue in his former employment as a roustabout and heavy equipment operator. Accordingly, the presumption of no work disability contained in K.S.A. 44-510e(a) is overcome as of the date claimant left work on December 12, 1989, due to his injuries. The restrictions imposed by Dr. Wilcox and Dr. Brown as considered by the vocational expert, Bud Langston, in arriving at his opinions, are credible and supported by the evidence. The Appeals Board finds the testimony of Mr. Langston to be the more credible with regard to the questions of claimant's loss of ability to access the open labor market and to earn a comparable wage. Both of these factors are to be considered in arriving at permanent partial general disability. Hughes v. Inland Container Corp., 247 Kan. 407, 422, 799 P.2d 1011 (1990). No specific formula is required. In this case, the Appeals Board finds no compelling reason to give either factor greater weight and therefore will average both factors giving equal weight to each. Taking into consideration the eighty-one percent (81%) loss in claimant's ability to perform work in the open labor market and the twenty-eight percent (28%) loss in his ability to earn a comparable wage results in a fifty-four and one-half percent (54.5%) permanent partial general body work disability. The permanent partial general body work disability is calculated by using the stipulated average gross weekly wage of \$510.68 which includes the average weekly value of the additional compensation in the form of health and accident insurance coverage on claimant furnished by the respondent. The value of such additional compensation in the weekly sum of \$34.21 is deducted from the average gross weekly wage for the period claimant worked after the date of accident. K.S.A. 44-511. During the period of time from June 6, 1988 to December 12, 1989 when claimant was back working for respondent at his regular job earning his regular wage, claimant would be limited to permanent partial disability based upon his functional impairment only which is found to be twenty percent (20%).

- (2) Future medical is to be provided upon proper application to the Director.

AWARD

WHEREFORE it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge George R. Robertson, dated December 30, 1993, be, and hereby is, modified and an award is entered as follows:

AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR OF claimant, Melvin Koerner, and against the respondent, Gilmore Construction and its insurance carrier, Tri-State Insurance Company, for an accidental injury sustained on April 15, 1988.

The claimant is entitled to 77.86 weeks temporary total disability at the rate of \$256.00 per week or \$19,932.16 followed by 79.29 weeks at \$63.53 per week or \$5,037.29 for a 20% permanent partial functional disability followed by 257.85 weeks at \$185.56 or \$47,846.65 for a 54.5% permanent partial general bodily work disability making a total award of \$72,816.10.

As of July 1, 1994, there would be due and owing to the claimant 77.86 weeks temporary total compensation at \$256.00 per week in the sum of \$19,932.16 plus 79.29 weeks permanent partial functional disability at \$63.53 per week in the sum of \$5,037.29 followed by 166.99 weeks at \$185.56 per week or \$30,986.66 for a total due and owing of \$55,956.11 which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance in the amount of \$16,859.99 shall be paid at the rate of \$185.56 per week for 90.86 weeks or until further order of the Director.

Further award is made that claimant is entitled to medical expenses, and any unauthorized medical expenses if any.

Future medical will be considered upon proper application.

Fees necessary to defray the expenses of administration of the Workers Compensation Act are hereby assessed against the respondent and such are directed to pay costs of the transcripts as follows:

Donalea Deines, C.S.R.	
Deposition of Dr. Howard Wilcox dated August 7, 1991	\$86.00
Deposition of Dr. Victor Eddy dated September 3, 1991	\$64.00
Deposition of Dr. Roy Neil dated September 3, 1993	\$84.00
	<u>\$234.00</u>
Debra Richecky, C.S.R.	
Preliminary Hearing Transcript dated October 8, 1991	\$232.38
Frank L. Peterson Reporting Service	
Deposition of Bruce Smith dated April 27, 1993	\$100.00
Dolores Eilts, C.S.R.	
Deposition of Richard Dinkel dated June 24, 1993	\$142.50

Deposition of Dr. Reiff Brown dated August 9, 1993	\$314.40
	<u>\$456.90</u>
Owens, Brake & Associates	
Deposition of Bud Langston dated November 23, 1992	\$323.28
Regular Hearing Transcript dated April 1, 1993	<u>\$390.57</u>
	\$713.85

IT IS SO ORDERED.

Dated this ____ day of July, 1994.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Gene F. Anderson, PO Box 1700, Hays, KS 67601
Scott J. Mann, PO Box 2977, Hutchinson, KS 67504-2977
George R. Robertson, Administrative Law Judge
George Gomez, Director